IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TALECRIS BIOTHERAPEUTICS, INC., AND BAYER HEALTHCARE LLC,	)	
Plaintiffs,	)	
v.	)	**C.A. NO. 05-349-GMS**
BAXTER INTERNATIONAL INC., AND BAXTER HEALTHCARE CORPORATION,	)	**Jury Trial Demanded**
Defendants.	)	
BAXTER HEALTHCARE CORPORATION,	)	
Counterclaimant,	)	**REDACTED VERSION DI 307**
v.	)	
TALECRIS BIOTHERAPEUTICS, INC., and BAYER HEALTHCARE LLC,	)	
Counterdefendants.	)	

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION *IN LIMINE* NO. 2 TO PRECLUDE EXPERT TESTIMONY REGARDING NON-INFRINGING ALTERNATIVES

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INTRODUCTION

Baxter completely misreads Plaintiffs' Motion *in Limine* No. 2. Plaintiffs are asking the Court to exclude any evidence or argument of two "non-infringing alternatives", namely, Octagam® and Flebogamma®. (D.I. 256 at 1.) Plaintiffs are not, as Baxter mistakenly suggests, seeking to exclude all evidence of other alleged non-infringing alternatives, namely lyophilized products. (D.I. 280 at 1.) Plaintiffs have properly applied the law, focusing upon the availability of Octagam® and Flebogamma® to Baxter. Given Baxter's lack of any meaningful response to Plaintiffs' Motion *in Limine* No. 2, Plaintiffs' Motion should be granted.

ARGUMENT

Plaintiffs have not mischaracterized the record regarding Mr. Den Uyl's opinion on the availability of Octagam® and Flebogamma® as non-infringing alternatives. Baxter admits that Mr. Den Uyl's report contains "one partial sentence in Footnote 98" pertaining to these two products. (D.I. 280 at 1.) This concession proves Plaintiffs' point, and also points out fundamental inconsistencies in Mr. Den Uyl's report. There is nothing "clear" about Mr. Den Uyl's opinion on these two products.

Assuming *arguendo* that Mr. Den Uyl's opinion is offered for pure rebuttal to Mr. Bokhart, despite that fact that Mr. Den Uyl is Baxter's primary expert on damages (not a rebuttal expert), there is absolutely *no factual basis for Mr. Den Uyl's opinion.* Mr. Den Uyl cannot simply pull an opinion out of thin air and then claim that it is viable because it is offered in rebuttal. Mr. Den Uyl's opinion should be excluded for this reason alone.

Further, Mr. Den Uyl unequivocally testified, and stated in his report, that the 5% concentration of a liquid IGIV is not a viable substitute for a 10% concentration. (D.I. 256 at 4.) As he recognized, the 10% concentration is advantageous because, *inter alia*, it reduces infusion

time. (*Id.*) Mr. Den Uyl should not be permitted to opine that the 5% liquid concentrations are non-infringing substitutes in the face of such admissions.

Baxter also mischaracterizes the "availability" prong of the applicable law, taking the position that because Octapharma and Grifols are direct competitors in the IGIV market, "it is obvious" that their respective products "are acceptable and available in the market." Again, Baxter completely misses the mark. The test is whether the alleged non-infringing alternatives *were available to Baxter*. As Plaintiffs point out, Mr. Den Uyl has no basis for testifying that Octagam® and Flebogamma® were available to Baxter. (D.I. 256 at 3.) His deposition testimony on this point was purely speculative:

REDACTED

(Mason Dec.[1] Ex. 1 at 143:2-12.)

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion *in Limine* No. 2 for the foregoing reasons, and for those set forth in Plaintiffs' Memorandum of Law in Support of Their Motion *in Limine* No. 2 (D.I. 256).

[1] The "Mason Dec." is the Declaration of Jaclyn M. Mason in Support of Plaintiffs' Reply Briefs in Support of Their Motions *in Limine* Nos. 1-5, filed concurrently herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 14th day of May, 2007 I electronically filed the foregoing **Plaintiffs' Reply Brief in Support of Their Motion *In Limine* No. 2 to Preclude Expert Testimony Regarding Non-Infringing Alternatives** with the Clerk of Court using CM/ECF which will send notification of such filing to the following:

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I also hereby certify that a true copy of the foregoing document was served upon the following in the manner indicated on May 14, 2007.

Via Hand Delivery and E-Mail	**Via Federal Express and E-Mail**
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